

THE COERCIVE POWERS
OF THE
GOVERNMENT
OF THE
UNITED STATES OF AMERICA.

A THESIS PRESENTED
TO THE
UNIVERSITY OF FREIBURG
FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY,
BY
ALBERT BUSHNELL HART.

AUGUST 1883.

PART III.
COERCIVE PROVISIONS OF THE CONSTITUTION.

EISENACH,
DRUCK DER BUCHDRUCKEREI DER „TAGESPOST“.
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CHAPTER III.

COERCIVE PROVISIONS OF THE CONSTITUTION.

PRELIMINARY SUGGESTIONS. The Constitutional Convention came together, May 29, 1787, uncertain how far its commission extended, and divided on many important questions which must come before it: but there was no dissent from the conviction that the new government must be able to protect itself from destruction and the state from anarchy; and that, whatever its powers, it must have some effective means of enforcing them. The form which those means were to assume was naturally suggested by the practice and precedents which had been applied in America during the century and a half preceding. Franklin's scheme in 1775 had proposed to vest in Congress, substantially the powers that had been exercised from beyond seas.¹⁾

The Articles of Confederation had to a certain extent adopted the principle: at least the acts forbidden to the States would have been resisted by the royal government and the powers given to Congress would have been admitted by the former Colonies, if exercised by England.

The United States had long since been recognised as independent of England: but they could not get rid of English institutions, English law or English forms. We shall find the words of English statutes, taken directly or coming through the medium of a State act, in the text of the Constitution.

A second element which entered into the formation of the coercive, as well as of other clauses of the instrument of government, was the influence of earlier Confederations. One or two institutions provided by the Articles of Confederation had prototypes, though in the absence of any record of the debates it is impossible to say how far they were borrowed and how far original.²⁾ In the debates of the Philadelphia and State Conventions and in the *Federalist* we begin to find allusions to, and comparisons with, the experience of other Federal States. It appears to have been at this time that Washington drew out or copied with his own hand an abstract of the Constitutions of the Greek, Swiss, Dutch and

¹⁾ Compare the credentials of the delegates. *Eliot* I, 128 et seq.

²⁾ For instance, the Committee of the States resembles the Dutch Council of State: and the arbitration court might have been suggested by Swiss precedents.

German Confederacies: the defects of each and the method of enforcement employed by each are carefully noted.¹⁾

A few weeks before the Convention assembled, Knox, Jay and Madison each sent to Washington a sketch of a Constitution suitable for the new government, of which the substance has been preserved:²⁾ and to the Convention itself were submitted four plans, by Randolph, Pinckney, Patterson and Hamilton. Throughout the various propositions ran side by side, and sometimes intermingled, three currents which had manifested themselves in the amendments suggested for the Article of Confederation.

The COERCION OF STATES as such, by the armed force of their fellow States, existed as a constitutional right only in Germany,³⁾ and there was nothing in the history of that country to recommend it. Madison's sketch nevertheless included it,⁴⁾ and the Virginia plan, in the preparation of which he had a considerable share, expressly declared it.⁵⁾

But when, on the third day of the Convention, the clause came up for debate, it was Madison himself who killed it, by a speech which has been a favorite source from which to draw quotations against coercion in any form.⁶⁾ The proposition was never revived, and for the very reason that it was dead beyond resurrection, the windows of heaven were opened for a flood of denunciations of the project, both in the Convention and afterward, as well from the friends as the foes of the Constitution. Hamilton, the unwavering advocate of a strong government called the plan „impossible — — a war between the parties“, „mad and impracticable“, „not deserving the name of government“.⁷⁾ Mason, who on May 30 pointed out the deficiency of the Confederation, in that it could not punish and coerce the States, on June 20 denounced the same form of coercion as „destructive of the rights of the people“.⁸⁾ To use force directly against the

¹⁾ Washington IX, 521 et seq.

²⁾ In an abstract made by Washington. North American Review XXV, 264 et seq.

³⁾ Schulze, Einleitung in das deutsche Staatsrecht, 250. I have followed Washington's abstract because, though in many respects incorrect, it probably measures the knowledge of the Convention on the subject of the early Confederacies.

⁴⁾ N. A. Rev. XXV, 265.

⁵⁾ § 6. Eliot V, 128 (May 29, 1787) as did Patterson's. Ibid. 176—7.

⁶⁾ May 31. „The more he reflected on the use of force, the more he doubted the practicability, the justice, the efficiency of it, when applied to people collectively and not individually. A Union of the States containing such an ingredient seems to provide for its own destruction. The use of force against a State would look more like a declaration of war than an infliction of punishment and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound“. Eliot V, 140.

⁷⁾ Eliot II, 198—205, 232—5; Federalist (Dawson's ed.) XV, p. 96, XVI, pp. 100—103.

⁸⁾ Eliot V, 133, I 429.

States was „dangerous and difficult“,¹⁾ „impracticable“, „repugnant to justice“,²⁾ „expensive and fatal“,³⁾ „cruel and non republican“,⁴⁾ „involves the good and the bad“,⁵⁾ entails „dreadful consequences“,⁶⁾ and so to the end of the chapter. The violent language loses much of its force, when we observe that it comes chiefly from the mouths of advocates of the new Constitution who are declaiming against the evils of a loose Confederation, in order to throw into relief the blessings of a government which has other means of coercion. The explanation of the sudden change of pitch may be found in the concluding words of Madison's famous speech of May 31: „He hoped that a system would be framed such as might render this resource unnecessary“. ⁷⁾

NEGATIVE ON STATE LAWS. A few minutes after Madison had spoken these words, the Convention without debate agreed to the following clause of Randolph's plan „[Congress shall have] power — — — to negative all laws passed by the several States contravening in the opinion of the national legislature, the Articles of Union.“⁸⁾ The power was one which had never been given to any federal government,⁹⁾ and was simply a revival of a practice which was particularly unpopular in America, because it had been exercised by royal prerogative.¹⁰⁾ Nor is it easy to see how it would remedy the crying defect of the Confederation. If Congress had no means of carrying its own acts into effect, it was not likely to make effectual a veto on State legislation. Madison, the author of the plan,¹¹⁾ was still convinced that it „was the least possible encroachment on the State jurisdictions“,¹²⁾ and that it could be made, by a little extension, to cover all possible cases of resistance by the States. When the subject came up again, June 8, Pinckney was ready with an amendment embodying the „system“ of which Madison had spoken, May 31: it was simply a proposition to give to „the national legislature — — authority to negative all laws which they should judge to be improper“. ¹³⁾ The real intention of the amendment

¹⁾ Madison, June 19. El. I, 425.

²⁾ Davie, July 29, 1788. Eliot IV, 21—2, 154—5.

³⁾ W. Nicholas, El. III, 100.

⁴⁾ Corbin, Ibid 105—6.

⁵⁾ Ellsworth, El. IV, 194—6.

⁶⁾ Randolph, El. III, 115—117.

⁷⁾ Eliot V, 140

⁸⁾ Eliot V, 128, § 7.

⁹⁾ It had not been suggested, so far as I am aware, between 1775 and 1787.

¹⁰⁾ Madison, in his letter to Randolph, April 8, 1787, as well as in the draft sent to Washington, says that the negative was intended to be exercised as it had been by the king. El. V, 107. N. A. Rev. XXV, 264.

¹¹⁾ That he suggested the clause to Randolph seems clear from the comparison of the letter and draft referred to on the preceding page.

¹²⁾ N. A. Rev. XXV, 264.

¹³⁾ Eliot I, 70.

was not concealed: it was intended to take all substantial power from the State legislatures;¹⁾ but even though the cautious Dickinson observed that the danger of encroachment was not from the side of the general government, the smaller States took alarm, and Pinckney's proposition was voted down.²⁾

Its advocates were not disposed to admit that they were defeated. Hamilton's plan provided for the appointment of State governors, with a veto power by the general government.³⁾ A few days later, Madison referred to the negative as „one security to the national government“.⁴⁾ The original clause of Randolph's plan came up again, July 17; but by this time the legislative and judicla powers of the general government were so far perfected that a negative was held to be unnecessary: even Madison defended it chiefly because, in his opinion, „the States will pass laws which will accomplish their purpose before they can be repealed by the general legislature or set aside by the national tribunals“.⁵⁾ The negative, in any form, was then formally rejected, and in its place was substituted nem. con. a clause making the laws and treaties under the Constitution of the United States „the supreme law of the land, binding on the State judiciaries“.⁶⁾ The old plan died hard: it was once again proposed by Pinckney;⁷⁾ and Madison twice referred to its omission, with regret:⁸⁾ but the Convention adhered to the substitute which it had accepted July 17.

THE „SUPREME LAW“ was not altogether a new idea. It had been suggested as long ago as 1780, that Congress ought to have „absolute power“, „supreme power“, „discretionary power“, either outright or sufficient to carry into effect the „powers granted“.⁹⁾ From another point of view, the same thought had been developed in Pelatiah Webster's proposition for a supreme authority with power „to enforce the obedience of all subjects of the United States“.¹⁰⁾ The latter was the point of departure taken by Madison, at the beginning of the Convention, in his wish „that the

¹⁾ Madison said „The negative would render the use of force unnecessary. The States could of themselves pass no operative act — without it, the States will continually fly out of their proper orbit. El. V, 171.

²⁾ By a vote of 3 to 7. Eliot V, 171—4: I, 400.

³⁾ June 18. Eliot I, 187.

⁴⁾ June 31. Eliot I, 432.

⁵⁾ Eliot V, 321. The general understanding was that, under the negative, no State acts would have legal effect until examined and confirmed by Congress.

⁶⁾ Eliot V, 322.

⁷⁾ Aug. 23: a two thirds majority of Congress was to be necessary to invalidate a law. El. V, 468.

⁸⁾ Aug. 28, Sept. 12. Eliot V, 497, 538.

⁹⁾ Washington, July 6, 1780. N. A. Rev. XXV, 253. Hamilton, Sept. 3., 1780. Ham I, 150—68. Noah Webster, 1785. Sketches of American policy, p. 31.

¹⁰⁾ Dissertation on American Liberty, p. 17.

new government should be endowed with physical means acting on individuals¹⁾ The supreme law and INDIVIDUALS upon whom to apply it, without the interference of any third party, were and were understood to be, each the correlative of the other.²⁾ When, therefore, the sixth section of Randolph's plan came up for debate, July 17, an amendment was readily carried, giving to Congress a power of legislation „for the general interests of the Union, and also all those [cases], where the States are severally incompetent, or in which the harmony of the United States would be interrupted by the exercise of individual legislation“.³⁾ Immediately following came the debate on the negative, which has just been described, ending with the insertion of the Supreme Law clause.⁴⁾ The legislative powers of the General Government were much modified during the course of the Convention: but the provision making supreme the laws passed pursuant to the Constitution, seems never again to have been questioned, and it appears substantially unmodified in the text of that instrument.⁵⁾

In the State Conventions the clause was the object of a great deal of criticism, not so much as being illogical in itself, as because Congress might assert power to pass laws not justified by the Constitution. In reply, the Federalist laid down with precision the constitutional doctrine which has been generally accepted since that time: „The laws of the Confederacy, as to the enumerated and legitimate objects of its jurisdiction, will become the supreme law of the land, — — — it would otherwise be a mere treaty, dependent upon the good faith of the parties, and not a government, which is only another word for political power and supremacy. But it will not follow that acts which are not pursuant to its constitutional powers will be the law of the land.“⁶⁾ There was no further dispute as to the supremacy of constitutional laws.⁷⁾ The controversies of the next seventy years were hinged upon another and more difficult question: who is to decide whether or no a given law or treaty is „pursuant to the Constitution“?

¹⁾ Letter of April 8, 1787; Eliot III, 107, 120.

²⁾ Knox's draft provided: „all national objects to be designed and executed by the General Government, without any reference to the local bodies“. N. A. Rev. XXV, 264.

³⁾ Eliot V, 321.

⁴⁾ Supra.

⁵⁾ Art. VI, § 2. The words of the section as it now stands appear in the report of the Committee of detail, August 6, Eliot V, 379. cf. Madison's motion July 18, to add „all cases arising under the national laws, and — — — such other questions as involve the national peace and harmony“. Eliot V, 332.

⁶⁾ Federalist (Dawson's ed.) XXVII, p. 180, XXXI, p. 205.

⁷⁾ Even in 1833 the actual issue raised was that the tariff was unconstitutional, though, by that time, the idea of getting free from the Union altogether had grown familiar. Vide *infra*.

THE JUDICIARY. The first resolution passed by the Convention, after its organisation was completed, was that there should be „a national government, consisting of a supreme legislative, executive, and judiciary.“¹⁾ The project of a national judiciary, which had been hinted at, rather than suggested, in 1780 and 1783,²⁾ was supported by the precedent of the Holy Roman Empire, and perhaps by that of the United Provinces;³⁾ and it was included in each of the four schemes submitted to the Convention.⁴⁾ June 13 and 19, the clause in Randolph's plan was agreed to, giving a somewhat restrained jurisdiction to the courts of the United States.⁵⁾ July 18., the day following that on which the negative had been superseded by the Supreme Law clause, the articles on the judiciary were again reached in course of debate, and Madison's amendment was accepted, to include „all cases arising under the national law“.⁶⁾ The Committee of Detail reported Aug. 6, as a substitute for the latter part of Randolph's proposition a clause for „controversies between two or more States (except such as shall regard territory or jurisdiction)“.⁷⁾ On Madison's motion, Aug. 27, the judicial power was to extend also to „controversies to which the United States shall be a party“.⁸⁾ The Committee of Style combined the various powers thus granted into the form which they assumed in the completed Constitution.⁹⁾ The law was made supreme: the Courts to expound it were provided; it remained only to furnish effective means for carrying the exposition into force, in order to endow the judiciary with consistent coercive powers.

COERCION BY THE JUDICIARY. The Constitution makes no express provision for the execution of process; it was assumed by the Convention and accepted by the country, that the Federal courts were to have, for the carrying out of their decrees, like powers and like officers to those of the State courts. The marshal,

¹⁾ May 30, 1787, Eliot V, 134, cf. I, 151, 391.

²⁾ By the Hartford Convention, Pelatiah Webster and Hamilton *supra* p. 4.

³⁾ Washington's abstract describes in detail the German Imperial Chamber and Aulic Council, and the Dutch „College of Admiralty“. Wash. IX, 531, 855.

⁴⁾ Eliot V, 129, 132, 176, 584.

⁵⁾ „Piracies and felonies on the high seas, captures from an enemy, cases in which foreigners or citizens of other States applying to such jurisdictions, may be interested, or which respect the collection of the national revenue, impeachment of any national officers, and questions which may involve the national peace and harmony“, El. V, 129, § 9.

⁶⁾ Eliot V, 372.

⁷⁾ In place of the words „Such questions as involve the national peace and harmony“. The Committee also reported the clause „between a State and the citizens thereof“, which was afterwards dropped. Eliot V, 437.

⁸⁾ Eliot V, 483.

⁹⁾ Eliot V, 536. Art. III, Section II.

his deputies and, in case of need, the Posse Comitatus of his district, were considered a part of the judicial system.¹⁾ The traditional English procedure²⁾ was the model as well for the courts of the United States as for those of the States. So far, there was no disagreement, but, besides the government, as represented by the judiciary and the individual, there was a third element to deal with: the States. If a State could be a party before the United States courts, it could be sued: if sued, it might be cast; if cast, judgment might issue against it; if payment were refused, process might be granted against a „Sovereign State“. The point was clearly seen in the State Conventions. To Madison's and Hamilton's genial interpretation that the States need appear as defendants only by their own consent,³⁾ it was urged with much force that judgment might sometimes legally be given against the original plaintiff, and that „gentle caution“ would not suffice to collect it.⁴⁾ On this point also have turned the interminable debates in Congress and out of doors, on the „Supreme Arbiter“. Yet, in the last resort, the defenders of state sovereignty, however much they have protested and resolved against the jurisdiction of the United States courts, have known how to turn the coercive power of the judiciary into a shelter for themselves. They have insisted that the only means of enforcing the laws was through the process of the courts: and, in the nature of things, it was impossible for any power that a United States marshal could bring into operation, to coerce an unwilling State. They knew quite as well as Hamilton that „there is no process of a Court by which in the last resort, the laws can be executed“.⁵⁾

In the organization of the government, immediately after the Constitution had gone into effect, two attempts were made to emasculate the coercive powers of the national courts, by providing other organs. Vining's proposition to establish a „Home Department“ did not even come to a vote; it was to have been the duty of the secretary, among other things „to correspond with the several States and see to the execution of the laws of the Union.“⁶⁾

The plan of vesting in the state courts the original jurisdiction provided for by the Constitution, though urged with a good

¹⁾ Hamilton observes that the power to provide for calling out the posse comitatus must be considered necessary and proper to carry the laws into execution. Federalist XXXV, p. 232.

²⁾ Supra.

³⁾ Eliot III, 533. Federalist LXXXI, p. 567.

⁴⁾ Patrick Henry. Eliot III, 542.

⁵⁾ Federalist XV, 96.

⁶⁾ July 23, 1789. Annals of Congress, 1789—91, p. 666.

deal of vehemence, was rejected¹⁾. One of the clauses of the judiciary act provided for a marshal „to execute throughout the district all lawful precepts directed to him, and issuing under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty“²⁾. The lawful precepts were understood to be such as issued according to English precedent: the „necessary assistance“ was the posse comitatus: and the system was completed by a later act, which made obstruction or resistance to the service of process a crime against the United States³⁾.

EXTRA - JUDICIAL COERCION. The question whether there be in the government of the United States any coercive power beyond that of the judiciary has usually been discussed like other constitutional subjects a priori. The Constitution has been a political Bible from which to draw proof texts. Each side deduces general principles from a single line of the Constitution, or a single page of the debates of the Convention, or a few quotations from the „fathers“; and rests upon its „hoc est meum corpus“. Of the hundred or more speeches in Congress on coercion, not more than two or three⁴⁾ discuss the bearing upon each other, and the effect, taken altogether, of the articles in the Constitution which concern the means of coercion or the occasions upon which they can be used. As in England, the possible means were; the militia, army, suspension of habeas corpus, and martial law: the occasions; collection of revenue, riot, insurrection, and rebellion⁵⁾. Are any of these means provided by the Constitution of the United States? Were precautions taken against any of these dangers to the State?

Both the organization and the control of the MILITIA had so long been wholly in the hands of the separate Colonies, that none but a few hardy „pamphleteers“⁶⁾ had so much as suggested

¹⁾ August 24, 29, 31. Annals of Congress, 783—5, 796—834. The objections to the district courts were various and contradictory: State courts were said to be sufficiently impartial (p. 783); there would be conflicts of jurisdiction and process, perhaps even of rival powers (796, 827); the appeal power was all that was necessary for the enforcement of the laws (p. 813); the law would be obeyed without „a reign of despotism“ (p. 832); „debtors would be obliged very suddenly to pay their debts“ (p. 820).

²⁾ Act, of Sept. 24, 1789, § 27.

³⁾ Act. of April 30, 1790, § 22. This act has been held to include every species of process, legalor judicial. U. S. Digest XII, 259.

⁴⁾ Webster in the debates on the Force bill is the only speaker who seems to have followed out the succession of the coercive propositions in the Convention.

⁵⁾ Lesser crimes, as forcible entry and detainer, have never given rise to any serious difficulties in the United States.

⁶⁾ Price's Observations (1784) p. 17; Noah Webster's Sketches of Am. Policy (1785) p. 37.

that it ought to be transferred to the general government. The work of the Convention was nearly finished before any scheme of general discipline was discussed¹⁾. August 18 and 23, a clause was adopted nearly as it now stands, giving to the Federal Government the right to organize, arm, and discipline the militia, and to govern such part of them as were employed in the service of the United States²⁾. The power thus conferred was not granted without sharp criticism in the Convention³⁾, and numerous attempts to attenuate it by limiting amendments⁴⁾. It was defended on the ground that the experience of the war had shown the necessity of a uniform and well-drilled force: but hints were not wanting that the militia was to be used to keep the Union together⁵⁾. The clause seems to have attracted little notice in the State Convention; the indignation of the particularists was reserved for the article prescribing the use that should be made of militia. It was different in the first two Congresses. The organization of the militia was one of the first subjects brought before the national legislature. After four successive recommendations by the President⁶⁾ and four unsuccessful attempts to get a bill passed, a uniform system was arrived at, in the act of May 8, 1792⁷⁾; and arms, drill and organization were prescribed for „the militia of the United States⁸⁾“.

One of the few powers of the General Government, which passed unchallenged through the Convention, was that of raising TROOPS in time of war⁹⁾. The clause forbidding States to keep up troops in time of peace was accepted with like readiness¹⁰⁾. It was observed that there was no similar obligation resting on Congress, and an attempt was made to qualify the power, by

¹⁾ Clauses for the control of the militia by the general government occur both in the Pinckney plan (May 29, 1787) and Hamilton's plan (June 18) Eliot V, 130, 584.

²⁾ A restriction was inserted, Aug. 27, by which the United States were to govern the militia only when in actual service. Eliot V, 480.

³⁾ Gerry said: „The plan will leave as black a mark as was set on Cain“. El. V, 443.

⁴⁾ Eliot V, 440, 443—5, 451, 464—6.

⁵⁾ Madison said, Aug. 23: „The greatest danger is that of disunion of the States; it is necessary to guard against it by giving sufficient powers to the General Government“. Eliot IV, 566.

⁶⁾ August 7, 1789. Jan. 8, 21, 1790. Dec. 6, 1790. Oct. 24, 1791. *Annals of Congress* 1789—91, pp. 615, 933, 1076, 1730; *ibid.* 1791—3, p. 15.

⁷⁾ August 8, 1789. *Ann. of Congr.* 1789—91, p. 688. April 26, July 1, 1790. *Ibid.* pp. 1791, 1799, 1800, 1804. Jan. 4, 1791. *Ibid.* 1840.

⁸⁾ The scheme was debated Feb. 21, 1792. *Ann. Cong.* 418—23.

⁹⁾ Some slight objection was made to allowing appropriations for two years; and Martin moved to limit the number of soldiers. Aug. 6, 1787. Eliot V, 443.

¹⁰⁾ Eliot V, 381, 548.

limiting the number of troops which could be kept up as a peace establishment¹⁾. The proposition was lost, but the advocates of coercive power did not fail to use the opportunity thus afforded: the danger of a standing army, they said, was another reason for giving Congress power to employ the militia²⁾. In the end the clause was left as it now stands, without limitation on the number of men, or the time or kind of service³⁾.

The spirit which had prompted the opposition to the establishment of a national militia would probably have shown itself quite as hostile to the army, but for the unceasing warfare with the Indians. Congress made haste to recognise and adapt to the Constitution of the United States, the establishment of the troops raised under the resolutions of the United States in Congress assembled⁴⁾. The army was formally organized by the act of Apr. 30, 1790. At every increase of the little army, protests were raised, however⁵⁾; and in 1794 and 1795, when the nation seemed drifting into foreign war, Congress twice refused to raise a force of a few thousand men⁶⁾. Hints were thrown out that there must be some other purpose for these troops than any that had yet been acknowledged⁷⁾. A third bill was more successful, and passed without the proposed amendments to limit the employment of the troops to „the protection of the frontiers“, or to „the protection and security of the United States against foreign invasion and against the Indian tribes⁸⁾. And one member of the house plainly declared that „if by executing the law was meant preventing the whites from encroaching upon Indians, and for suppressing insurrections, he hoped it (the army) would always be so employed⁹⁾.

¹⁾ Aug. 18, 1787. On Gerry's proposition. Eliot V, 443.

²⁾ Federalist XXXV, 232. A motion was made, Sept. 14, to insert before the clause for the organization of the Militia: „(in order) that the liberties of the people may be better secured against the danger of standing armies in time of peace“. Eliot V, 544.

³⁾ Madison and Pinckney plainly express the opinion that it may be necessary to call out troops to subdue civil commotions. Eliot V, 444. IV, 260—1. Fed. XXVIII, pp. 181—2.

⁴⁾ Boudinot's bill, Sept. 17, 1789. Ann. Cong. 894. It became a law Sept. 29.

⁵⁾ See Steele's speech, Jan. 5, 1793. Ann. Cong. 792.

⁶⁾ The House bill for raising twenty five thousand men for „service during a war which may break out between the United States and any European power“ failed altogether, May 29, 1794. The Senate bill for ten thousand troops was rejected by the House, May 30. Ann. Cong. 561, 709—10, 735—7, 108—113.

⁷⁾ Smilie, May 30, 1794. Ann. Cong. 735.

⁸⁾ The first of the amendments was proposed by Madison. Ann. Cong. 1221. The author of the second is not stated in the Annals, 1222. The proposition is perhaps that which J. C. Hamilton — on what authority is not apparent — ascribes to Madison in the following words: „That regular troops ought not to be used against citizens of the United States, but only for protection against foreign invasion and the Indian tribes“. Republic VI, 147.

⁹⁾ Wadsworth. Ann. Cong. 1793—5, 1221,

SUSPENSION OF HABEAS CORPUS. Suitable forces for coercive purposes having been provided, it remained to make sure that the forms of justice were not put in motion to prevent the government from acting effectively in times of emergency. The power of Congress to suspend the habeas corpus seems to have been tacitly recognised from the first: for the Convention had almost expired, before Pinckney's proposition to limit the suspension to the most urgent cases, and then only for a limited time, obtained a hearing¹⁾. Rutledge and Martin held that the unquestioned power of the State to suspend the writ, ought to be sufficient²⁾, and Wilson believed that it would answer to depend on the judges, in their discretion, not to release dangerous men. The Convention accepted Morris' amendment to define the limitation in the words: „The privilege of the writ of Habeas Corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it;“ and no heed was paid to Martin's indignant remonstrance, that the power would be made „an engine of oppression, to force the submission of the States to the general government“³⁾.

MARTIAL LAW. As the English law, though it provides coercive agents which could not in practice be governed by strict legal forms, still never recognizes as possible a state of things in which the civil authority is suspended⁴⁾, so the Constitution does not authorize the proclamation of martial law in terms. Both the Continental Congress and the States had exercised that power in time of war, by the simple right of necessity⁵⁾. Following both English and American precedents, the power to declare war included the power to carry on war effectively; and it was to be expected that, in extreme cases, civilians, as well as soldiers, would be subjected to the will of the military commander. The experience and the practice of the half century following proved that the United States would assert and maintain such a power⁶⁾.

¹⁾ Pinckney had included a clause on the subject in his plan, May 29. Eliot V, 131, and had submitted a formal motion to limit the suspension, Aug. 20. Ibid 445.

²⁾ Eliot V, 484, I, 375.

³⁾ Martin's speech is remarkable in pointing out the course which was actually taken in 1861. The Act of a State, he said, would be declared Rebellion: the Habeas Corpus would be suspended; the leaders of the movement would be arrested and sent into arbitrary confinement in a distant part of the country. Eliot I, 375.

⁴⁾ Cf. Chap. II.

⁵⁾ Cf. Chap. II.

⁶⁾ As far as mere military law was concerned, it was provided that the military should be subject to „discipline only when in the service of the United States“. Eliot V, 450. The chief variation from English precedent was, that the Articles of War emanated from the legislative, not the executive.

OCCASIONS FOR COERCION. Nowhere is the complexity of the government of the United States shown in stronger relief, than in the enforcement of the laws. Ordinarily, where the State and its subjects are the only individualities, but two relations are possible: under a federal government, the federation as a unit, its members, and the people, must all be considered, six combinations must be taken into account: either the States or individuals may practically, if not legally, oppose the laws of the General Government; or individuals may oppose the laws of the States; and, in either of the three cases, either the States or the General Government, may have or may claim, a right to interfere. Under the Articles of Confederation, Congress had legislated for States, without regard to individuals; the Constitution provided for legislation for individuals, without regard to States: neither instrument was completely effective, because, in the one case individuals, in the other case States, sometimes proved their existence by preventing the execution of the laws which ignored them.

The „Supreme Law“ was indeed meant to be obligatory upon individuals¹⁾, and it was pointed out with great clearness that any other principle was the „parent of anarchy“²⁾, and could be carried out only by military force³⁾. Looking at the work of the Convention as a whole, it is plain that another sanction for the laws was provided than that advocated by the enthusiasts who held that „mankind were capable of governing themselves“⁴⁾, or that the „good sense of the people will be found the best army“⁵⁾. The reign of the „coercion of law“ was about to begin; but it was not to be, as has often been maintained on the floor of Congress, a purely peaceful regime. It was Hamilton who emphasized the contrast between the „coercion of law“⁶⁾, and the „coercion of arms“: but however skilfully he applied the first term to the system of the new government, and the latter to that of requisitions, his argument was always, not that there was no force in the government, but that force was no longer the only coercive means“. The idea of governing, at all times, by the simple force of law“, he says „is a revery“⁷⁾. „The government must possess all the means — — of executing the powers with which it is

¹⁾ Pinckney said in the South Carolina Convention: „The necessity of having a government which should at once operate upon the people, was conceived indispensable by every delegation present.“ Eliot IV, 256.

²⁾ Federalist XVI, p. 100.

³⁾ Ibid 103, and the Debates and Federalist passim.

⁴⁾ Grayson, Eliot III, 278,

⁵⁾ Jefferson II, 99—100.

⁶⁾ I find the term first used in his speech of June 18, 1787. Cf. Federalist XV, p. 96.

⁷⁾ Federalist XXVIII, p. 181—2.

entrusted, that are possessed — — by the Governments of the particular States¹⁾. So far was the thought of execution of the laws impressed upon the Convention that Madison, on one occasion, proposed that the United States should undertake to execute the judgments of the courts of one State in the limits of another²⁾.

It has many times been alleged, by men who were supposed to have a profound knowledge of American history, that the Convention did not foresee the danger of resistance to the laws, under the authority of the States³⁾. On the contrary, the debates at Philadelphia, and in the State Conventions, bristle with allusions to the probable conflicts of the States with the General Government. The friends of the Constitution pointed out to the small States the advantages of a system which could restrain their more powerful neighbors⁴⁾: the enemies of the whole plan fastened upon the power of the Federal Government to coerce States, as the chief reason for rejecting it⁵⁾. The further danger that combinations of several States would be formed to resist the United States was not overlooked⁶⁾, and the ominous words „Southern Confederacy“ began to be heard⁷⁾. The advantage to the States of their organized authorities as a „nucleus of defence“⁸⁾, and of a trained militia subject to their orders⁹⁾; the risk of coercion¹⁰⁾; the assurance that an unsuccessful attempt to coerce a State would disrupt the Union¹¹⁾, the possibility of a revolution which would be too much for any force that the government could bring to bear¹²⁾, — all these dangers were foreseen, all these considerations were urged: but the Constitution was none the less ratified, and coercion began at once to be applied.

¹⁾ Fed. XVI, p. 104. To a similar effect, Rutledge, Burwell, Pendleton and Madison. Eliot IV, 299, 292. III, 294, 378, 384, 414 etc. The only man in the State Conventions who strenuously opposed coercion in the abstract, was Patrick Henry. Eliot III, 411.

²⁾ Aug. 29, 1787. Eliot V, 488.

³⁾ John Quincy Adams, quoted in the *Globe* 1860—61, p. 33. Many speakers in the debates of 1860—62. Ibid 392, 400, 592, 683 etc. In 1833, however, Grundy was not contradicted in his assertion that the case had been provided for. Congressional Debates IX, 666.

⁴⁾ G. Nicholas, Eliot III, 119. Hamilton, Federalist XV, p. 103. Mason, Eliot V, 332 etc.

⁵⁾ Henry. Eliot III, 57 etc.

⁶⁾ Federalist XLV, p. 330, LVIII, pp. 414, 215. Hamilton in Eliot II, 222. Davie in Eliot IV, 58, etc.

⁷⁾ Randolph. Letter of Oct. 10, 1787. Eliot I, 407—8.

⁸⁾ Federalist XVIII, pp. 183, 185.

⁹⁾ Madison. Eliot IV, 414.

¹⁰⁾ Mason, Lowndes, Livingston and others. Eliot V, 217, IV, 290, II, 213.

¹¹⁾ Hamilton, Eliot I, 416.

¹²⁾ Federalist XVI, p. 106, XLIII, p. 304.

COLLECTION OF REVENUE. Among the defects of the Confederation, the most notorious was its inability to collect revenue¹⁾. But, though it was generally expected that the Convention would recommend an efficient scheme of finance, the details were not perfected without much opposition. In each of the three great Constitutional compromises, a clause relating to revenue was accepted as one side of the bargain. In the state conventions, particularly those of New York and Virginia, a very determined effort was made to preserve the lifeless system of requisitions on the States, or at least to permit direct taxes, only after the States had refused or neglected to comply.²⁾ Lansing, Mason and Patrick Henry, drew dark pictures of the ruin of the state governments and the misery of the people of the United States, under collection by „military coercion“³⁾. Men as sensible as Monroe thought the other powers of the Government enough for its defence, without direct taxation⁴⁾; while both Hamilton and Madison so far temporized as to suggest that the general government had still power to make requisitions, as before, in case the new system did not work well⁵⁾. The common sense of King, Jay and Marshall, once more set forth in clearest terms the teachings of experience and reason: they showed that the danger of „war and carnage“ was almost removed by a power of collection from individuals⁶⁾; and that control over its own revenues was essential to the existence of the Government⁷⁾. The Constitution therefore went into operation, with the understanding that it authorized the United States to collect taxes directly and by the means usually employed by the States⁸⁾.

The first important question that came up for debate in the

¹⁾ Vid. Chap. II.

²⁾ This is nearly the plan proposed by Madison in 1781, and by Pinckney in 1786. Vid. Chap. II.

³⁾ Thus Mason said, June 30, 1787 „Punishing non payment of taxes with death would be mercy compared with military collection“. Eliot V, 217. Henry's glowing oratory went still further: „I never will give up that darling word, requisitions; my country may give it up, a majority may wrest it from me, but I never will give it up till my grave.“ Eliot III, 148.

⁴⁾ Eliot III, 214.

⁵⁾ Federalist XXXIV, 227, XLIV, 385—7, XLIII, 322—3. This is one of the most significant cases of the „opportunism“ of the fathers of the Constitution. It must never be forgotten that the Federalist itself was not written as a constitutional treatise, but to get people to vote for the Constitution, by putting it in the best possible light.

⁶⁾ Cf. supra 13.

⁷⁾ Eliot II, 57, III, 229, 226, 380 etc.

⁸⁾ Madison reminded Henry that a Virginia act authorized a revenue officer to call on bystanders to assist him, if resisted in the execution of his duty. Eliot III, 415.

new Congress concerned the revenue. Madison moved April 8, 1789, that the propositions of 1783¹⁾ be made the basis of a new financial system „now that the Union, by the establishment of a more effective government has recovered from the state of imbecility that heretofore prevented a performance of its duty“²⁾. Two attempts were made to prevent or to delay the establishment of a national system; it was proposed to collect the taxes, provisionally, under the laws and penalties of the several States³⁾; and a few months later, was revived the familiar proposition to forbear from laying taxes directly, until requisitions had been refused⁴⁾. The revenue bill went on its course: many well-known and unwelcome features were borrowed from the English statutes, including the once odious search-warrants. Nevertheless it passed into an act for the collection of imposts, the only taxes considered necessary⁵⁾.

Import duties, however, were by no means sufficient for carrying out Hamilton's far-seeing schemes. He meant to develop the powers of the government by teaching the nation how to use them: the excise was to be at the same time a means for providing for the assumption of the State debts, and a proof that the United States could reach the individual. The first excise bill which he prepared⁶⁾ was thrown out by the House⁷⁾. His report made at the beginning of the next session⁸⁾ appears to have been the inspiration of a bill submitted a few days later by Sedgwick⁹⁾. The same predictions and threats were made as in the case of the other acts for the organization of the government: and an argument saw the light for the first time, which was destined to be heard many times thereafter; the excise was said to be an „unequal“ tax, in the constitutional sense, because it bore upon only one section of the country¹⁰⁾. The act passed without much alteration, and a rather stringent search clause was retained¹¹⁾.

RIOT AND INSURRECTION. In the debates of the Con-

¹⁾ Chap. II.

²⁾ Ann. Cong. 102—3.

³⁾ Bordinot's motion, Apr. 11, 1789. Ann. Cong. 119—20. One of the objections brought against it was, that in some States there were no revenue laws. Ibid 367.

⁴⁾ Tucker's Constitutional Amendment. Voted down at once. Ibid 763.

⁵⁾ Act of July 31, 1789.

⁶⁾ Ann. Cong. 2017. June 13. 1790.

⁷⁾ Ibid 1633—9, 1643—4.

⁸⁾ Ibid 2025—6. Dec. 13, 1790.

⁹⁾ Ibid 1838.

¹⁰⁾ Parker, Jan. 11, 1791. Ann. Cong. 1860.

¹¹⁾ Act of Mar. 3, 1791. The likelihood, that some sort of collision would occur in the execution of the act, must have been evident. Sedgwick said: „He could assure gentlemen that he did not contemplate the execution of the laws by military force“. Jan. 6, 1791. Ann. Cong. 1849.

ventions, as in the Constitution itself, and throughout English jurisprudence, the terms „insurrection“, „rebellion“ and „combination to resist the execution of the laws“, are not defined, and often not distinctly separated. Their meaning, as they appear in the Constitution must be gathered from the comparison of the various articles relating to them. Three propositions empowering the United States to keep the peace, were introduced into the Convention by Pinckney, May 29, 1787, and a fourth by Madison, July 18. They were as follows: (1) „The legislature of the United States shall have power to subdue a rebellion in any State on application of its legislature“. (2) „To call forth the militia to execute the laws of the Union, to enforce treaties and suppress insurrection and repel invasions.“ (3) „On the application of the legislature of a State, the United States shall protect it against domestic insurrections¹⁾.“ (4) „A republican government shall be guaranteed to each State and — — each State shall be protected against foreign and domestic violence²⁾.“ The commentary on the four clauses taken together, is to be found in the history of the times. Not six months before, application had been made to Congress to help „subdue a rebellion“, in a State which seemed unable to protect itself against „domestic violence³⁾“; „domestic insurrections“ is an euphemism for slave risings, a spectre which was ever before the Southern statesmen⁴⁾. The second clause is devoted to national objects, and one of them is to „suppress insurrection“. Aug. 6, the Committee of detail, reported the first clause unaltered, the second clause less the words „to enforce treaties“, and the third and fourth clauses together in the form of a guaranty against „foreign invasions and domestic violence⁵⁾“. A few days later, the first clause having come up for debate, Madison moved so to amend it as that it should read „to subdue a rebellion in any State against the government thereof etc.“ The motion was carried nem. con. „since“, as he explained, „there might be a rebellion against the United States⁶⁾“; but the whole clause as amended was then lost on a tie vote⁷⁾. The duty of protecting the States was, however, not overlooked; for the consolidated guaranty clause

¹⁾ Eliot I, 132.

²⁾ Eliot V, 333.

³⁾ Shays' Rebellion. Cf. Chap. II.

⁴⁾ Cf. Randolph, El. III., 73, 80. Henry, Ibid. 423, 427. Madison, Ibid. 251.

⁵⁾ Eliot V, 376—82.

⁶⁾ The logical implication is, of course, either that rebellions against the United States could not be subdued, or that the permission of the State legislature was not necessary for subduing them. Madison's speeches in the Convention show clearly which view he took. Cf. El. V., 466, III., 383.

⁷⁾ Eliot V, 467.

passed, Aug. 30, without essential modification: a motion to strike out „on application of the legislature“ failed to gain acceptance¹⁾.

The power of the United States government to interfere in its own behalf, had already been secured. Aug. 23, the second or militia clause passed nem. con., in its present form: „To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.“ The times were not such that the Convention could suppose it was voting a clause without meaning; threats were already beginning to be made that the new government would be resisted, if it put its powers to the test²⁾. „Should such an emergency at any time happen under the National government,“ said Hamilton, „there could be no remedy but force. The means to be employed must be proportional to the extent of the mischief“³⁾. Jefferson objected to the whole clause. „Our Convention,“ he says, „has been too much impressed by the insurrection of Massachusetts and on the spur of the moment has set up a kite to keep the hen-yard in order“⁴⁾. Madison and others foresaw that force must be used, and indicated the militia as the proper instrument⁵⁾; and Hamilton, while so far coinciding with them, believed that, „if the insurrection should pervade a whole State or a principal part of it, the employment of a different kind of force might become unavoidable“⁶⁾.

It appears to have occurred to but one man, at that time, that the United States could not put down an insurrection against its own authority, except by consent of the State, in which it took place⁷⁾, and this construction was disposed of, for the moment, by Madison's reply. „By putting it into the power of the State government to refuse the militia — — you destroy the general government and sacrifice particular States“⁸⁾. The right of the States to employ their own militia to suppress „domestic insurrections“ was not denied⁹⁾.

¹⁾ Eliot V, 479—80. The phrase permitting application „of the executive, when the legislature cannot be convened“, was added Aug. 30 and Sept. 12. Ibid. 479—80.

²⁾ Johnston, Eliot IV, 79. Mason „dreaded popular resistance to its (the Constitution's) operation, and predicted dreadful effects“. Lee made him the spirited reply that in that case „the friends to that paper will meet the affliction call with firmness and fortitude“. Eliot III., 586. It must of course be remembered that these war-cries were bits of special pleading.

³⁾ Federalist XXVIII., pp. 181—2.

⁴⁾ Nov. 17, 1787. Jefferson II., 318—19.

⁵⁾ Madison, Eliot III, 378, Corbin ibid. 112.

⁶⁾ Federalist XXVIII., pp. 181—2.

⁷⁾ Mason in the Virginia Convention. „The consent of the State legislatures ought to be had. On real emergencies this consent will never be denied, each State being concerned in the safety of the rest. Eliot III., 378.

⁸⁾ Eliot III., 381. The question is not raised in the Federalist.

⁹⁾ Eliot III., 301, 325, 427, 441.

THE POWER OF CONGRESS OVER THE MILITIA was not left to theory alone, but the provisions of the Constitution were at once made effective. The President early received authority, though not without some opposition¹⁾, to call the militia into service, at his discretion, against the Indians²⁾. In the course of the debates on the organization of the militia³⁾, it was suggested by Madison and moved by Benson, Dec. 21, 1790, that the President be authorized to call out the militia „to repel invasions and suppress insurrections⁴⁾. Sherman objected that the consent of the State must be had in the latter case; and the matter was carried no further. The clause was again introduced into the militia bill of 1792⁵⁾; and the House struck it out, and ordered a special bill to be prepared on the subject⁶⁾. In spite of the now familiar arguments that no force was necessary to compel the obedience of the people⁷⁾, that the States were capable of suppressing any insurrection that might arise⁸⁾, and that military government was going to be established⁹⁾, the bill was reported, passed into an act, and was approved, May 2, 1792. The President was authorized to call out „the militia“ in three cases: in case of invasion or imminent danger of invasion, at his discretion; in case of insurrection against a State, on application of the State authorities; in case „the laws of the United States shall be opposed or the execution thereof obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshal by this Act,“ on certificate of a judge or justice of the United States¹⁰⁾. The powers of the marshal were to be the same as those which the sheriffs in the several States exercised by law „in executing the laws of their respective States.“ The act clearly recognizes the possibility that „combinations to obstruct the execution of the laws“ may amount to

¹⁾ Ann. Cong. 893, 894, 912, 972.

²⁾ Acts of Sept. 29, 1789 and Apr. 30, 1790.

³⁾ Supra p. 11.

⁴⁾ Ann. Cong.

⁵⁾ Ibid. 1817—20.

⁶⁾ Apl. 12, 1792. Ibid. 555.

⁷⁾ Steele called it „an insult to the majority of the people to hold out the idea that it may be necessary to execute the laws at the point of the bayonet. Ibid. 553. Page said: „The clause suggests an idea of resistance which I will not suppose can exist.“ Ibid. 574. Gerry was sure that no such exigency could be anticipated. Ibid. 554.

⁸⁾ Ibid. 574, 576.

⁹⁾ Ibid. 575.

¹⁰⁾ Before the militia could be called out in the third case, a proclamation must be issued „to command such insurgents to disperse“. § 3, cf. Chap. V.

insurrection or rebellion, and that such combinations may be fomented by a whole State¹⁾.

The word REBELLION is found but once in the Constitution²⁾; but the possibility of the crime, and the remedy for the danger are amply recognised. Of the two kinds of treason defined, one is plainly rebellion, according to English precedent³⁾. The members of the Convention were not so wedded to legal process as to hold that the government could only deal with treasonable attempts upon its own existence, after the crime had been consummated. Even those who cried out against the use of force in lesser emergencies, admitted that „rebellion“ was a case „in which the military force of the State can properly be exercised against the citizens“⁴⁾. The exact form of coercion which was to be employed was left for the government to decide for itself. It was generally understood that military force would be called forth in case of riot⁵⁾, and the friends of the Constitution could do no more towards making the power palatable, than to hope that the heroic remedy need seldom be applied⁶⁾. The only question that arose was, whether the militia could be employed in the service. It was admitted that under the clause „to execute the laws of the Union“, militia might be called out to suppress disturbances less than insurrection⁷⁾. The question was not directly asked whether destroying the government would be included within the term

1) „And if the militia of a State, where such combinations may happen, shall refuse or be insufficient, it shall be lawful for the President of the United States, if the legislature of the United States is not in session, to call forth and employ such numbers of the militia of any other State or States most convenient thereto, as may be necessary.“ § 2. On this section, Giles had said, Apr. 23, 1792: „The exigency contemplated by the section was of a great magnitude, that of the opposition of a whole State to the laws of the Union, that it requires a more competent provision than was provided by the bill. He was fully impressed with the propriety of the government's possessing a power to execute its laws and to provide for its own security.“ Ann. Cong. 576.

2) „Habeas Corpus shall not be suspended unless where in cases of rebellion or invasion the public safety may require it.“ Art. I, Sect. IX, § 2. Cf. supra.

3) „Treason against the United States shall consist only in levying war against them.“ Art. III, Sect. 111, § 1. Cf. supra 74. Hamilton observed that treason would often be connected with seditions which embrace a large proportion of the community. Federalist LXIII, p. 518.

4) Mason, June 20, 1787, in his argument against taxation of individuals. The context shows that by „state“ he meant „government“. Eliot V, 217. Federalist XXVII, p. 175.

5) Cf. supra.

6) Federalist XXVII, p. 175.

7) Madison said in the Virginia Convention: „There may be a resistance to the laws which cannot be termed an insurrection. — There might be riots to oppose the execution of the laws — and there might probably be other cases.“ Eliot III, 408, 410.

„combination too powerful to be subdued by the ordinary course of judicial proceedings“¹⁾).

One man in the Convention, and one alone, seems to have clearly seen, or at least to have confessed to seeing, the point where the state and federal authorities must assuredly come in conflict, sooner or later. The Constitution recognised the States as being so far sovereign that there might be rebellions against their authority²⁾. It was held out to them as an advantage of the new Constitution, that it guaranteed them against „dangerous combinations, insurrections and rebellions“³⁾, in case they needed aid. Martin of Maryland throughout the Convention pertinaciously defended the cause of the particularists. He foresaw that „the time might come when a State should have recourse to the sword“. „In which case“, said he, „the citizens, if they obey the authority of their own Government will be guilty of treason against the United States; if they join the General Government, they will be guilty of treason against their own State“⁴⁾. He proposed as a remedy, a clause which would have simply taken the governor off the carefully adjusted machinery of government and let it run to destruction. He proposed to introduce into the Constitution of the United States a principle like the ancient *Faustrecht* of the German Confederation, and the „*jus insurrectionis*“ of Hungary, and likely to produce the same effect⁵⁾. He found no hearing⁶⁾: but on the other hand, the Convention could not declare in so many words that the citizen of a State owed it no allegiance. „If the United States and the individual States will quarrel“, said Ellsworth, „if they want to fight, they may do it, and no frame of government can possibly prevent it. It is sufficient for this Constitution that, so far from laying them under a necessity of contending, it provides every reasonable check against it“⁷⁾.

¹⁾ See *supra* 19. Cf. El. I, 372.

²⁾ Expressly by the clause requiring the extradition from one State back to another of persons „charged with treason, felony or other crime“. Art. IV, Sec. II, § 2.

³⁾ Wilson, July 18, 1787. Eliot V, 332. Carroll, *Ibid* 333. Randolph, Eliot I, 484—5. Madison, Eliot V, 333.

⁴⁾ Martin's Letter. Eliot I, 382.

⁵⁾ „Provided that no act or acts done by one or more of the States, or by any citizen of any one of the United States under the authority of one or more of the said States, shall be deemed treason, or punished as such, but in case of war being levied by one or more of the States against the United States, the conduct of each party towards the other and their adherents respectively, shall be regulated by the laws of war and of nations.“ Martin's Letter. Eliot I, 383.

⁶⁾ The amendment appears nowhere in the Journals, and was perhaps offered to a Committee.

⁷⁾ Eliot V, 488.

The question was left unsettled, because it was incapable of settlement, under a federal government except by the actual experiment of hard knocks. Fortunately for the continuance of the republic, the jousting day was still three quarters of a century in the future. It cannot be said that even the final trial of arms has settled any legal principle. It has been demonstrated in practice that the United States can constitutionally, and will forcibly, command the obedience of every man in the Union; but it has also been demonstrated that, though the authority of the States cannot keep out armies, or prevent confiscations, it is accepted as a moral defence against the legal penalty for criminal disobedience.



